DEC 10 2001

No. 01-596

IN THE

Supreme Court of the United States

CITY OF TACOMA, WASHINGTON, *et al.*,
Petitioners,

v.

QWEST CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in ruling that various provisions in petitioners' municipal franchise ordinances, taken in combination and as applied to respondent's telecommunications operations, are preempted by 47 U.S.C. § 253.

RULE 29.6 STATEMENT

Respondent Qwest Corporation is a wholly owned subsidiary of Qwest Services Corporation, which is a wholly owned subsidiary of Qwest Communications International Inc. No publicly held company owns 10% or more of the stock of Qwest Communications International Inc.

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QWEST CORPORATION,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

This case concerns the validity, under state and federal law, of numerous different municipal ordinances that regulate the access of telecommunications providers to local rights-of-way in the State of Washington. The court of appeals held that state law preempts most applications of the challenged ordinances, Pet. App. 21a-22a, and that the federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (Telecom Act), preempts the remainder, 23a-34a. This petition followed.

The petition should be denied. First, in holdings that petitioners do not mention, the court of appeals found that state law preempts most applications of the challenged ordinances to respondent Qwest Corporation. That independent state law holding would make this case an

exceptionally poor vehicle for this Court's review of any issue arising under section 253. In any event, the decision below was correct; it creates no circuit conflict warranting certiorari; and at this point the Court's review would be premature, given the pending administrative proceeding initiated by the Federal Communications Commission ("FCC") to address the set of issues presented here.

STATEMENT OF THE CASE

1. Qwest is a nationwide provider of telecommunications services and is the incumbent local exchange carrier in 14 western States, including Washington. Petitioners City of Tacoma, City of Auburn, and City of Des Moines are municipalities within Qwest's service region. To serve its customers within those municipalities, Qwest uses public rights-of-way, mostly for the deployment of its wireline facilities, but also, to a lesser extent, for the deployment of its wireless network as well.

Petitioners have enacted various ordinances requiring Qwest and other telecommunications companies to obtain franchises before using their public rights-of-way. These ordinances impose a wide range of regulatory obligations on providers seeking a franchise, and they consume almost 150 pages of the Appendix to the petition. *See* Pet. App. 53a-107a, 157a-181a, 210a-247a, 276a-295a, 327a-337a. Qwest has not obtained a franchise pursuant to any of the ordinances.

2. This litigation began when petitioners and numerous other Washington cities filed suit in state court seeking a declaration that they had no obligation to reimburse Qwest for the costs of equipment relocations necessitated by the cities' right-of-way improvements. Pet. 6. Qwest removed the case to federal court on diversity grounds and filed counterclaims seeking a declaration that state and federal law preempts the franchise ordinances. Pet. App. 5a.

The district court granted summary judgment for the plaintiff cities on the relocation costs issue. The court

separately dismissed as unripe Qwest's counterclaim challenging the franchise ordinances because petitioners had not yet attempted to enforce them against Qwest. Pet. App. 45a.

3. The court of appeals affirmed the judgment for the plaintiffs on the issue of relocation costs, but reversed the dismissal of Qwest's counterclaims on the preemption issue. Only the latter issue is before this Court.

a. The court of appeals first rejected the district court's conclusion that the counterclaims are unripe. As to the constitutional component of the ripeness inquiry, it held that Qwest faces "a realistic danger of sustaining a direct injury" from the franchise ordinances. Pet. App. 18a (internal quotation marks omitted). As to the two-part "prudential component" of ripeness, the court first held that the issue is "fit for judicial decision" because the claim presents "a pure question of law"— whether the ordinances are preempted by state and federal law. *Id.* at 18a. The court explained that "[n]o further factual record would narrow or clarify that issue," in that "there is no factual dispute about the activity conducted by Qwest, nor the applicability of the ordinances to its activity." *Id.* at 19a. Second, the court determined, postponing review would impose on Qwest "an immediate and significant change in [Qwest's] conduct of [its] affairs with serious penalties attached to noncompliance." *Id.* at 20a.

b. Turning then to the merits of Qwest's state and federal preemption arguments, the court of appeals held that the franchise ordinances are preempted as a matter of law.

The court first considered the preemptive effect of a recently enacted state law, ESSB 6676. That law establishes a statewide "system by which cities may grant . . . franchises" to telecommunications providers, "significantly alter[ing] the ability of municipalities to regulate telecommunications utilities." Pet. App. 21a. The court held first that, as a matter of state law, ESSB 6676 "clearly conflicts with," and thus

preempts, petitioners' ordinances "insofar as they purport to require [Qwest] to obtain a franchise for its wireline facilities," *id.* at 22a. As a result, the court held, "the relief sought in Qwest's counterclaim – so far as it deals with wireline facilities – has been granted by [state] statute." *Id.*

Because Washington state courts had not yet interpreted the effect of the complex state statute as to wireless facilities, the court of appeals declined to reach the preemptive effect of that statute on Qwest's wireless operations, reasoning that "a state court is better equipped to first interpret ESSB 6676 and its relationship with other state laws." Pet. App. 23a. The court instead turned to the preemptive effect of the federal Telecom Act.

Section 253(a) of the Communications Act of 1934, as amended by the Telecom Act, generally preempts all state or local laws that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Subsections (b) and (c), in turn, are "safe harbors" that exempt certain legal requirements from the preemptive force of section 253(a). Subsection (c) provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. § 253(c). Subsection (d) authorizes the FCC, after notice and comment, to preempt any state or local law "that violates subsection (a) or (b)." 47 U.S.C. § 253(d).

The court of appeals held that petitioners' ordinances "include several features that, in combination, 'have the effect of prohibiting' Qwest and other companies from providing

telecommunications services" in violation of subsection (a). Pet. App. 26a. The features at issue include, among others, restrictions on the transferability of a telecommunications carrier's ownership, arbitrarily cumbersome application requirements, and various "discretionary factors that have nothing to do with the management or use of the right-of-way." *Id.* 26(a).

Having determined that, in the aggregate, these ordinances violate the threshold prohibition of section 253(a), the court next considered whether they fall within the scope of the section 253(c) savings clause. The court first observed that, as the FCC has confirmed, the "right-of-way management" preserved under section 253(c) "means control over *the right-of-way itself*, not control over *companies* with facilities in the right-of-way." Pet. App. 27a-28a (emphasis added). The court then determined that petitioners' ordinances regulate "not merely the rights of way," but also "the telecommunications companies themselves," and therefore fall outside the scope of this savings clause. *Id.* at 29a.

The court identified four primary features of the ordinances that "most seriously violate § 253(c)." *First*, the ordinances compel providers to undergo a lengthy, dilatory application process that includes filing extensive information about their financial soundness, technical and legal qualifications, and current and planned services – *i.e.*, information that relates only to the provision of services and not to management of the rights-of-way. Pet. App. 29a-30a. *Second*, the ordinances regulate the transfer of a provider's stock, even though stock transfers have no general connection to any right-of-way management issue. *Id.* at 30a-31a. *Third*, several of the cities (including two of the petitioners) require that franchisees give those cities the best available rates and terms on telecommunications services the franchisees offer, and all three petitioner cities require franchisees to provide excess telecommunications capacity for the cities' own use.

Those requirements, the court observed, are directed at regulating service and not rights-of-way. *Id.* 31a.

Fourth, "and perhaps most problematic," the court concluded, "the ordinances grant [petitioners] unfettered discretion to insist on unspecified franchise terms and to grant, deny, or revoke a franchise based on unnamed factors," Pet. App. 32a, that are not limited to factors relevant to the impact of the franchisee's proposed use of the city's rights-of-way.[1] Because the court held that the ordinances fall within the scope of the section 253(a) prohibition but outside the scope of the section 253(c) savings clause, it concluded that they are preempted by section 253 as a whole.

REASONS FOR DENYING THE WRIT

The petition should be denied, first, because state law complications would make this case an inappropriate vehicle for certiorari; second, because the decision below is correct and creates no circuit conflict warranting this Court's review; and, third, because this Court's review would be premature in any event given the FCC's pending notice of inquiry on this general set of issues.

I. THE INDEPENDENTLY PREEMPTIVE EFFECT OF STATE LAW MAKES THIS CASE A POOR CANDIDATE FOR CERTIORARI

As a threshold matter, even if petitioners' claims otherwise warranted certiorari, which they do not, this case would present a poor vehicle for this Court's review of any federal question relating to section 253. In a holding petitioners do not mention, let alone challenge, the court of appeals held that

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[1] Although those four features are "the aspects of the ordinances that most seriously violate § 253(c)," the court added that still others "are objectionable as well," Pet. App. 32a-33a, citing as examples public hearing requirements, negotiation requirements, and franchise fees based on factors other than costs relating to the use of the right-of-way, *id.* at 33a n.19, all of which also are unrelated to management of the right-of-way itself.

state law preempts petitioners' ordinances as they apply to *all* of Qwest's wireline operations. *See* Pet. App. 20a-22a. The court then indicated that a variety of different state law provisions might also preempt those ordinances as they apply to Qwest's wireless operations as well. *See id.* at 22a-23a & n.9. Because it is this Court's settled practice not to review a lower court's determinations of state law, this Court's review of any of the questions presented here would be confined, at the most, to the preemptive effect of federal law on a municipality's regulation of *wireless services*. *See Wharf (Holdings) Ltd. v. United Int'l Holdings Inc.*, 121 S. Ct. 1776, 1781-82 (2001); *see also Lambrix v. Singleton*, 520 U.S. 518, 522-23 (1997); Robert L. Stern, et al., *Supreme Court Practice* 172-73 (7th ed. 1993).

That limitation would, at best, substantially distort this Court's review of petitioners' arguments under section 253. The great majority of right-of-way disputes arising under that provision concern municipal restrictions on the deployment of *wireline* facilities. In contrast, *wireless* operations place different and far fewer demands on rights-of-way,[2] and they are subject to special federal protections against certain state and local restrictions.[3] Thus, if this Court were otherwise inclined to review the relationship between municipal right-of-way

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[2] *See generally In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 99-217, 14 FCC Rcd. 12,673, 12,712 ¶ 71 (1999) ("*FCC Notice*") ("wireless carriers typically impose far less burden on public rights-of-way than carriers that offer service primarily by means of wireline telephony").

[3] For example, 47 U.S.C. § 332(c)(3) provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service." As the FCC has explained, "a State or local rights-of-way management procedure or requirement, as applied to [mobile service] providers, is permissible under section 332(c)(3) if it constitutes regulation of terms and conditions *other than rates or entry*. Any requirement that functions as an entry regulation, however, is *not permissible as applied to [mobile service] providers*." *FCC Notice*, 14 FCC Rcd. at 12,714 ¶ 74 (emphasis added).

regulation and section 253, it should grant certiorari to review a typical case, in which the Court's review would focus on wireline applications, rather than this case, in which the Court's review would be limited to wireless applications and would raise numerous state and federal law complications.

Finally, as the court of appeals observed, various provisions of Washington law may independently preempt the franchise ordinances *even as to Qwest's wireless operations.* Pet. App. 22a. For example, a separate provision of ESSB 6676 prohibits municipalities from enacting regulations "specifically relating to the use of the right of way by a service provider" if they "[i]mpose requirements that regulate the services or business operations of the service provider, except where otherwise authorized in state or federal law." RCW § 35.99.040(1)(a). Many of the challenged ordinances plainly regulate Qwest's "business operations," as prohibited by ESSB 6676.[4] Similarly, "some provisions of the ordinances might be preempted by state statutes regulating in the same subject area" (Pet. App. 22a n.9), such as the state law provision, discussed below, that preempts petitioners' ordinances imposing non-cost-based franchise fees, which are the subject of petitioners' third question presented. *See* pp. 10-11, *infra*.[5] For all of these

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[4] Although *this* provision of ESSB 6676 provides its own "safe harbor" for certain local laws that "do not otherwise . . . "[v]iolate section 253 of the [Telecom Act]," RCW § 35.99.040(2)(c), that safe harbor is available only for laws regulating "the placement of facilities," *id.* § 35.99.040(2). The court of appeals already has found that petitioners' regulatory ordinances contain a host of provisions that regulate *more* than the mere "placement of facilities." *See* Pet. App. 29a-33a.

[5] As a further example, two of petitioners' ordinances require providing those municipalities "the best available rates and terms." Pet. App. 31a. But RCW § 80.36.180 prohibits telecommunications providers in most instances from receiving from any customer "a greater or less compensation for any service rendered" than it receives from any other customer for similar services under similar conditions. And state law also precludes a municipality from enacting any ordinance requiring a telecommunications provider to offer a rate different from the rate filed by the provider with the Washington Utilities and Transportation Commission (the "WUTC"). *See*

reasons, an opinion by this Court concerning the preemptive effect of the federal Telecomm Act on petitioners' ordinances may very well have no real-world effect on the concrete matter at stake between the parties. It would be, in effect, a wholly advisory opinion. *Cf. Bell Atlantic-Maryland, Inc. v. Prince George's County*, 155 F. Supp. 2d 465, 478 (D. Md. 2001) (holding ordinance vacated under state law after court of appeals vacated district court's prior order finding same ordinance preempted under section 253).[6]

II. THE PETITION PRESENTS NO SPLIT OF AUTHORITY WARRANTING CERTIORARI.

Despite petitioners' arguments to the contrary, the decision below presents no circuit conflict warranting this Court's review. *Cf.* Sup. Ct. Rule 10.

Petitioners first claim (Pet. 17-21) that, in declining to require a carrier-specific factual inquiry under section 253(a), the decision below conflicts with the Eleventh Circuit's interpretation of section 253 in *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001). That is incorrect. As relevant here, the *BellSouth* court held that the district court in that case had erred in holding that certain municipal ordinances were preempted by section 253(c) itself

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General Telephone Co. v. Bothell, 716 P.2d 879, 883 (Wash. 1986). Providers are required to file their rates with the WUTC, RCW §§ 80.36.100, 80.36.110, and to charge exactly the rate filed with and approved by the WUTC, RCW § 80.36.130. As a result, a rate approved by the WUTC "has the force and effect of law," *Bothell*, 716 P.2d at 883, which preempts any local ordinance that "conflicts" with the filed rate, *id.* at 884. Those state-law provisions invalidate the "most favorable community" rate provisions in petitioners' ordinances.

[6] Although Qwest believes that the court of appeals correctly rejected the threshold ripeness and standing issues advanced by petitioners below (*see* Pet. App. 15a-20a & n.6), this Court's agreement on that point would be a non-waivable jurisdictional prerequisite to any further review of this case on the merits.

without first determining that the ordinances violated the primary prohibition of section 253(a). *See id.* at 1191-92 & n.15. The Eleventh Circuit remanded "for further proceedings," but only "to determine whether the sections of the ordinances violate subsection (a)." *Id.* at 1191. The Eleventh Circuit nowhere required the district court to conduct an evidentiary hearing or make an individualized factual determination; it objected not to the absence of a factual determination under section 253(a), but to the absence of *any* section 253(a) inquiry at all. Here, of course, the court of appeals did conduct precisely such an inquiry, and it determined that the requirements of the challenged ordinances do violate section 253(a). Pet App. 25a. *BellSouth* requires nothing more, and, as discussed below, the carrier-specific factual inquiry that petitioners seek is neither necessary nor appropriate.

There is similarly no merit to petitioners' suggestion (Pet. 19) that, by declining to order such an inquiry, the decision below "appears to be at odds" with the Sixth Circuit's decision in *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (2000). In *Dearborn*, the complaining carrier had contended, in effect, that *any* franchise requirement, no matter how small, automatically constitutes a "prohibition" for purposes of section 253(a); it reasoned that, if such a requirement goes unmet, a carrier is prohibited from providing service. *Id.* at 624. The Sixth Circuit rejected this argument as "sophistry." *Id.* Nothing in the decision below is to the contrary. Expressly acknowledging *Dearborn*, the court of appeals explained that preemption of these ordinances arises not from "the mere franchise requirement, or the possibility of denial alone," but from the burdensome substance of the numerous franchise conditions. Pet. App. 27a n.11.

Petitioners also contend that, in two references to non-cost-based fees (Pet. App. 26a, 33a n.19), the decision below creates a second conflict with *Dearborn*. The Sixth Circuit there upheld, as "fair and reasonable compensation" under section

253(c), what appears to have been one such fee. As an initial matter, while the court below included non-cost-based fees within the set of provisions invalidated by section 253, it also noted that state law might well have independent preemptive force. The court was right. State law preempts the fee ordinances at issue in this case, and this Court's review of any federal preemption issue with respect to those fees would thus be entirely academic. *See* RCW § 35.21.860(1) (prohibiting municipalities, with enumerated exceptions, from imposing any "franchise fee" upon a telephone service provider "for the use of the right of way") (cited in Pet. App. 22a n.9); *see also* pp. 6-9, *supra*.[7]

In any event, there is no conflict between *Dearborn* and the decision below that could justify certiorari. The question in *Dearborn* was whether the specific fee at issue there constituted "fair and reasonable compensation" for purposes of subsection (c). The district court in that case had answered in the affirmative, reasoning, among other things, that the fee was commensurate with "the amount of use contemplated (twenty-seven miles)" and was supported by "the fact that [the carrier] had agreed in earlier negotiations to a fee almost identical to what it was now challenging as unfair." *Id.* at 625. The Sixth Circuit upheld the district court's reasoning as "thorough" and "sound." *Id.*

The petition alleges no facts similar to those presented in *Dearborn*, and the two cases are readily distinguishable. In this case, the court of appeals held that, "[t]aken together" with various other requirements, such fees violate subsection (a) without being saved by subsection (c). Pet. App. 26a; *see also id.*

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[7] State law does allow municipalities to impose a six-percent "gross receipts *tax*" on telephone companies, RCW § 35.21.870 (emphasis added); *see* Pet. App. 26a n.10, but such taxes, as distinguished from "non-tax fees" (*id.*), are not at issue here. Qwest's challenge below was limited to non-cost-based fees for use of the rights-of-way. Qwest did not challenge the separate six-percent gross receipts tax. That exaction was a tax, not a fee for use of the rights-of-way. *See* US WEST Ct. App. Br. 23 n.29.

at 25a (challenged ordinances "include several features that, in combination," violate subsection (a)). The *Dearborn* court addressed a separate issue: whether the specific fee at issue there was preempted by subsection (c) *itself*, on the theory that Congress created a private right of action to challenge a fee ordinance that "violat[es]" *that* subsection even if the ordinance does not "rise to the level" of violating subsection (a). 206 F.3d at 624. The court below did not address that issue. Rather, when it turned to subsection (c), it included petitioners' non-cost-based fees within a footnote listing miscellaneous "objectionable" requirements. Pet. App. 32a-33a & n.19. Nothing in that footnote creates a circuit conflict warranting this Court's review.[8]

Finally, even if there *were* a circuit conflict on the proper application of section 253 in this setting, this Court should permit the FCC to address it in a pending administrative proceeding relating to this very set of issues. Pursuant to its authority to issue general rules interpreting the provisions of the Communications Act, *see AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), the FCC has begun a proceeding to consider, among other things, the proper scope of right-of-way ordinances in light of the restrictions of section 253. *See FCC Notice*, 14 FCC Rcd. at 12,712 ¶ 70. The FCC's *Notice* in that proceeding underscores the Commission's "concern that local regulation should not reach beyond traditional rights-of-way matters and . . . aspire[] to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunications service is offered to the public," as well as the Commission's further "concern

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[8] Petitioners allege disagreement among various district courts concerning certain issues arising under § 253. Pet. 26 & nn.9-10. Such a conflict, of course, is not a cognizable basis for certiorari. *Cf.* Sup. Ct. Rule 10(a). Among other considerations, this Court normally benefits from deferring review until a set of issues has received full analysis in the courts of appeals. The development of further appellate analysis would be particularly useful where, as with § 253, the issues arise in a number of different factual settings.

about requirements imposed on carriers that use the public rights-of-way that are unrelated to their rights-of-way usage." *Id.* at 12,714 ¶76 (internal quotation marks and brackets omitted). At this stage in the development of the case law, it would be appropriate for the Court to defer any review of these policy-laden issues until after the FCC has had an opportunity to resolve them. *Cf. Braxton v. United States*, 500 U.S. 344, 348-49 (1991).

III. THE COURT OF APPEALS DID NOT ERR IN RESOLVING THE ISSUES BEFORE IT.

On the merits, petitioners' argument reduces to the claim that the court of appeals erred on three separate grounds, relating to appellate procedure, section 253(a), and section 253(c) respectively. Of course, mere error-correction is customarily not an appropriate basis for seeking certiorari. Sup. Ct. Rule 10. And, in any event, there is no error to correct.

1. Petitioners' procedural claim (which appears as the second question presented) asserts that the court of appeals erred by "misinterpreting ... federal rules of procedure" and, in particular, the standard for evaluating a motion for judgment on the pleadings under Federal Rule 12(c). *See* Pet. 13. Following circuit precedent, *see Enron Oil Trading & Transportation Co. v. Walbrook Ins. Co.*, 132 F.3d 526, 529 (9th Cir. 1997), the court of appeals framed the standard, in passing, as "[w]hether, on the facts alleged, Qwest is entitled to judgment as a matter of law." Pet. App. 23a. Petitioners apparently believe that, in referring to "the facts alleged," the court was referring to the facts alleged *by Qwest* rather than those alleged by petitioners. *See* Pet. 21-22.

There is no basis for that assumption. Indeed, the court's citation of *Enron Oil* suggests just the opposite— that judgment may be entered under Rule 12(c) only when "the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to

judgment as a matter of law." *See Enron Oil*, 132 F.3d at 529 (internal quotation marks omitted). Applying that rule, which it did not purport to alter, the court below indicated that only two general "facts" are "material" here—"the activity conducted by Qwest," and "the applicability of the ordinances to its activity"—and that each is undisputed. Pet. App. 19a. The court's entry of judgment under Rule 12(c) was thus appropriate and unexceptional.[9]

2. Petitioners separately contend that the court of appeals erred in resolving the threshold preemption inquiry under section 253(a) as a matter of law on the face of the municipal ordinances. Pet. 22-23. In petitioners' view, that provision requires a highly fact-specific inquiry into the effect of such an ordinance on the *particular* telecommunications carrier alleging preemption.

That proposition, for which the petition cites no genuine authority (*see* pp. 9-10, *supra*), is incorrect. Far from requiring a carrier-specific inquiry, section 253(a) expressly precludes, with respect to all carriers, all state or local ordinances that "prohibit or have the effect of prohibiting the ability of *any* entity to provide *any* interstate or intrastate telecommunications service" (emphasis added). Petitioners' contrary, countertextual interpretation would threaten the very discrimination that section 253 is designed to preclude, because it would make various municipal restrictions applicable to some carriers but

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[9] Citing *Singleton v. Wulff*, 428 U.S. 106 (1976), petitioners assert that the court committed procedural error in resolving the merits of the counterclaims rather than remanding for the district court to address those claims on the merits in the first instance. Pet. 23. As petitioners themselves concede, however, "*Singleton* recognized that '[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeal,' and 'announce[d] no general rule.'" Pet. 24 (quoting *Singleton*, 428 U.S. at 121). Here, following *Singleton*, the court properly exercised that discretion to decide the merits of the counterclaims. Pet. 19a. Petitioners' disagreement with that factbound application of "a properly stated rule of law" is not a proper ground for seeking certiorari. Sup. Ct. Rule. 10.

not others on the basis of their individual competitive circumstances. It would also subject carriers to dilatory, fact-intensive litigation before obtaining judicial relief from franchise requirements that would delay the market-sensitive deployment of telecommunications facilities.

There is no merit to petitioners' further contention (Pet. 14-16) that the court of appeals' approach to this issue "appears inconsistent with" this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). As an initial matter, *Iowa Utilities Board* addresses *different statutory language* located in a *different section* of the Telecom Act (47 U.S.C. § 251(d)(2)) governing an entirely *different aspect* of telecommunications regulation: a competing carrier's access to an incumbent telephone company's network elements at cost-based rates. Presumably for those reasons, petitioners did not even cite *Iowa Utilities Board* in their briefs below, much less contend that the decision compels a ruling in their favor. If anything, *Iowa Utilities Board* cuts against petitioners' argument for a carrier-specific inquiry, because the "impairment" analysis required under section 251(d)(2) is conducted on an industry-wide, rather than carrier-specific, basis. More generally, federal preemption disputes are typically decided on general legal principles rather than on the basis of case-specific factual inquiries, and there is no basis for a different approach to section 253.[10]

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[10] *See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Dev't Comm'n*, 461 U.S. 190, 201 (1983) ("The question of preemption is predominantly legal."); *see also CSX Trans., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (invalidating fact-specific state claim as preempted by general federal legal standard); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1987) ("The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."). There is no merit to petitioners' contention that the decision below conflicts with the FCC's order in *In Re TCI Cablevision*, 12 FCC Rcd. 21,396 (1997). Although the order states that a party must submit "credible and probative evidence that the challenged requirement falls within the proscription of § 253(a)" in order to trigger action by the agency, the

3. The final question on which petitioners seek review is whether the court of appeals erred by citing, within the list of problematic conditions on the use of municipal rights of way, particular franchise fees that would entitle petitioners to receive well more than the costs that such use imposes on the rights-of-way. *See* Pet. App. 26a, 33a & n.19. A fee that does more than make a municipality whole, such as a fee based on a carrier's gross revenues or some other non-cost-based factor, is not "fair and reasonable compensation . . . for *use* of public rights-of-way." 47 U.S.C. § 253(c) (emphasis added); *see New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001). A fee based on the putative "fair market value" of municipal rights-of-way beyond "reimbursement of costs" (Pet. 28) is similarly an exaction for the supposed *value*, rather than fair and reasonable compensation for the *use*, of these bottleneck assets. More generally, the imposition of non-cost-based fees would necessarily chill the deployment of new telecommunications facilities. That effect would be profoundly inconsistent with the overarching purpose of the Telecom Act, which is to help the telecommunications industry make the transition from regulated monopoly to full competition. *See Iowa Utils. Bd.*, 525 U.S. at 370.[11]

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evidence at issue involved the nature of the requirements, not the particular circumstances of individual carriers. *Id.* at 21,440 ¶ 101.

[11] As the FCC has indicated in recent litigation, the imposition of revenue-based fees is difficult to square with the requirement that franchise fees be "competitively neutral and nondiscriminatory," and for that reason too such fees are "problematic under section 253(c)." Br. of FCC and United States as Amici Curiae, at 14 n.7, filed in *TCG New York, Inc. v. City of White Plains*, Nos. 01-7213 & 01-7255 (2d Cir.). That is so because, even if a revenue-based fee were uniformly applied, it "might well have no relationship to either the extent of each carrier's use or the costs it imposed on the municipality. It therefore could be inconsistent with the competitive neutrality requirement of 253(c)." *Id.* For example, under a gross-revenue-based fee system, if company A has competitive efficiencies that allow it to obtain higher gross revenues than company B from the same right-of-way

Finally, petitioners rely, by analogy, on "just compensation" principles in the Takings Clause context as a basis for imposing above-cost assessments. Pet. 27-28. Of course, petitioners present no claim for just compensation. But even if Takings Clause principles were somehow applicable here, they would undermine petitioners' position. As this Court has explained, "[i]t is the owner's loss, not the taker's gain, which is the measure" for payment due in the Takings Clause context. *United States v. Causby*, 328 U.S. 256, 261 (1946).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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access, company A will also suffer a higher fee. A fee that is charged *because of* a company's competitive advantages cannot be described as "competitively neutral."